

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **74-1823**

United States Court of Appeals
FOR THE SECOND CIRCUIT

VERMONT FOOD INDUSTRIES, INC.,
Plaintiff-Appellee,
against

RALSTON PURINA COMPANY,
Defendant-Appellant.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF DEFENDANT-APPELLANT
RALSTON PURINA COMPANY

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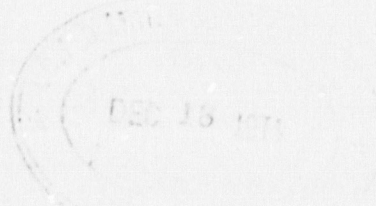




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No. 74-1823

VERMONT FOOD INDUSTRIES, INC.,
Plaintiff-Appellee,
against
RALSTON PURINA COMPANY,
Defendant-Appellant.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Civil Action No. 6753

BRIEF OF DEFENDANT-APPELLANT RALSTON PURINA COMPANY

Preliminary Statement

This appeal is taken from a Special Verdict and Judgment for plaintiff, a Vermont poultry farmer, in the amount of \$298,870, against defendant, the largest poultry feed manufacturer in the world, for breach of implied warranties of merchantability and fitness for a particular purpose. Plaintiff succeeded in persuading a six-man jury, after eleven trial days and some two hours deliberation, that defendant's chicken feed sold to it during a period of two and one-half years caused its hens to lay fewer eggs

than they otherwise might have. Trial took place before District Judge Albert W. Coffrin, who on February 20, 1974, denied without opinion defendant's motions for judgment notwithstanding the verdict and for a new trial.

Shortly prior to submission of the case to the jury, plaintiff abandoned its negligence claim (A402-03),* any question of strict liability was eliminated both by plaintiff's counsel and by the court below (A424-25), and the claim for breach of express warranty was dismissed (A424-25). Thus, the case proceeded to the jury solely on the question of breach of implied warranties, plaintiff's theory being that the feed formula was defective in its amino acid balance, causing lowered egg production (A376; A381). Plaintiff produced not one whit of direct evidence of such a defect, but relied on the pyramiding inferences of expert witnesses drawn principally from its own egg production numbers.

In a case where there was no dramatic outbreak of disease or death following ingestion of defendant's feed, where there was not a particular feed shipment in question but thousands of tons delivered throughout a long period, and where seven separate flocks in Maine and Vermont were concerned, equivocal circumstantial evidence as to defect, causation and damage should have been ruled insufficient as a matter of law, and judgment rendered in defendant's favor. It is defendant's position on this appeal that the court below erred not only in denying its motions for judgment (A420-22; Motion for Judgment N.O.V.), but also, particularly in view of the nature of plaintiff's claimed injury and proof, in foreclosing a key defense: that over a five-year period, on annual sales of approximately a million tons of chicken feed with uniform nutritional standards, defendant did not receive a single complaint of a similar nature.

* References to the Joint Appendix are designated "A" and references to the Exhibit Volume "E". "Tr." refers to the trial transcript.

Statement of Issues Presented for Review

1. Did the court below err in excluding proof as to the absence of similar complaints, thereby entitling defendant to a new trial?

2. In view of the nature of plaintiff's alleged injury and the equivocal circumstantial proof as to defect and causation, did the court below err in refusing to direct judgment for defendant as a matter of law?

3. As to that identifiable portion of plaintiff's claim supported by an expert's response to a hypothetical question which lacked foundation in the record, did the court below err in (a) admitting this evidence, and (b) refusing to direct judgment for defendant as a matter of law?

4. Was plaintiff's proof as to the *quantum* of damages so speculative and conjectural that it should not have been submitted to the jury, thereby entitling defendant to a new trial on damages?

Statement of the Case

Plaintiff is a corporation engaged in the business of raising chickens for the production and sale of eggs, and also selling eggs which it does not raise (A145). The corporation consists principally of Leopold and Jeannine Leriche, who have been Vermont poultry farmers for more than twenty years. Plaintiff's egg-producing business is seven to eight years old (A7; A133), and during these years it has fed defendant's feed to some of its hens* (A137). At

* Hens are female chickens in the egg-laying cycle. From hatching to maturity (a period of roughly 20-23 weeks), the chickens are known as pullets. They generally reach their peak egg production at 28 to 32 weeks, lay in that range for about four months, and continue laying eggs at a declining rate for a total period of approximately one year. At that point, they can be "recycled" (a procedure known as molting) by removing and later returning feed and water, which extends production, or sold for meat.

any given time throughout the period in issue, plaintiff had about 200,000 chickens, some on Vermont farms and some in Maine.

In August 1972, during a period when the egg business was depressed (A147; A306), plaintiff first discovered that in one of its existing flocks its hens were too fat. This was the origin of its contention, which ripened into judgment, that three flocks it then owned and four flocks it had owned at a prior time failed to produce eggs at peak rates because they were obese, or suffered from a condition known as Fatty Liver Syndrome, and that this condition was caused by defendant's feed. From the time of the discovery, and even after the complaint in this action was filed months later, plaintiff went right on buying defendant's feed.

At the time suit was commenced, plaintiff had an outstanding feed bill in the amount of \$136,750.84, which was awarded to defendant on its counterclaim by the court below.

For proof of its claim, plaintiff largely relied on expert testimony, chiefly that of a poultry nutritionist, Dr. Hoffman. Apart from its principals Mr. and Mrs. Leriche, plaintiff's other witnesses included veterinarians, Drs. Bryant, Murray and Gibbs; a feed manufacturer, Mr. Morrill; and Mr. Mercia. Dr. Snetsinger, a nutritionist; Dr. Eldridge, a veterinarian; and Dr. Nesheim, a nutritionist from Cornell University, were witnesses who gave expert testimony on defendant's behalf.

The Feed in Issue.

The alleged damage period extended from July 1970 to July 1973. Plaintiff stopped buying defendant's feed at the end of October 1972 (A133).

Between July 1970 and Fall 1971, plaintiff fed its hens defendant's "Pro-Lay" feed, which had a minimum guar-

anteed level of 15 per cent protein (A328-29). For its Maine flock, however, plaintiff ordered an 18 per cent protein feed (A136a).

In Fall 1971, plaintiff changed to defendant's new "Life Cycle Feeding Program" at its Vermont complex only. This new feeding program was keyed to meet the differing nutritional requirements of growing and laying birds, by varying the protein levels and other standards with the age of the bird (A324-30; A350-58). The laying ration in the new program called for a 14 per cent protein level; however, plaintiff continued to order a ration with 15 per cent protein for its Vermont hens.

The key elements developed at trial regarding chicken feed were its energy (calorie) content, protein level and amino acid balance. While the evidence touched on all three elements, as the trial unfolded, plaintiff zeroed in on amino acids as the nub of its complaint about the feed (A380-81). Plaintiff's stated contention was that the amino acid levels were somehow incorrect.

The energy or calorie content of the feed was considered to be related to obesity, in that the ingestion of more energy than a chicken requires can result in deposits of excess fat.* However, chickens do not appear to fall prey to the human vice of eating (and overeating) for social pleasure, but generally eat to meet their energy requirements (A176). Protein levels in chicken feed at one time were regarded as highly significant; however, the expert nutritionists for both parties agreed that amino acids, the building blocks of protein, are now viewed as the key factor, and lowered protein levels are more widely used in

* "Fat" got to be a dirty word in the course of this trial, although it is indisputable that laying hens normally have fat, and indeed require it for egg production (A151-52; A267). Something is wrong with hens that don't have fat (A392).

poultry feed formulation (A211; A325-26). There is a correlation between protein levels and the energy content of feed in that a higher protein level generally indicates lower energy (A78; A201; A217).

The only direct testimony as to the composition of defendant's feed is that (1) the feed satisfied legal protein levels (A166), (2) the energy level of the feed was within the ranges recommended by every one of the authorities which plaintiff introduced in evidence (A330), and (3) the feed contained all amino acids necessary to do the job for which it was made (A331-32).

While plaintiff's counsel pinpointed an alleged defect in the nutrient standards of the feed formula as the basis for its claim, the feed and management program also became significant in the course of the trial. Defendant, in various printed materials, recommended procedures for feeding and good poultry management, from lighting and ventilation of the chicken houses to egg collections (*e.g.*, E34). Lighting is a stimulant to egg production; since chickens will eat when the lights are on, their maturity may be hastened by long periods of light. Controlled lighting is in this sense akin to controlled feeding (A264-65; A312; A333).^{*} While advancing the start of egg production may be more economical for the farmer, pullets brought to maturity too early (less than 22 weeks) tend to have low peak production, lower production and smaller eggs (A311; A333).

By its own admission, plaintiff did not follow defendant's lighting program, but followed a hatchery's recom-

^{*} Controlled feeding, as by measuring or regulating the actual quantity of feed each chicken eats, is not generally practiced in Vermont, as plaintiff's witness Mr. Mercia testified (A312). Tests conducted by defendant have shown two or three percent greater production when birds are control-fed (A158). But since it requires very close management attention, controlled feeding is not often practiced in the industry at all (A174; A262; A334).

mendation (A404; A419). Defendant's salesman at times observed that there was excessive lighting in plaintiff's pullet house, and so advised plaintiff (A317). Plaintiff's records establish that its chickens were brought to maturity at 20 weeks (A251-56), and therefore it should not have reasonably expected optimal egg production. Nor did plaintiff follow defendant's recommendations as to egg collections (A319). Plaintiff's egg pickups were highly sporadic (A108-10), which the testimony indicated would not only affect quality but also increase breakage (A300; A302).

Significantly, plaintiff did not use defendant's feed throughout the entire period of alleged damage. While defendant had delivered feed to plaintiff on a near-daily basis, it is undisputed that on six or more occasions, at plaintiff's instruction, defendant delivered no feed at all to the Vermont operation. Each interruption lasted for a period of from ten days to two weeks (A359-60). There was no evidence as to what plaintiff's chickens were eating during these times.

The Flocks in Issue.

Damages were claimed and awarded as to seven flocks of plaintiff's hens, six situated in a complex of laying houses in Vermont and the seventh in Maine ("the Dostie flock"). The laying houses in plaintiff's complex were designated "A," "B" and "C," and the six Vermont flocks were identified throughout the trial by the letter of the laying house they occupied. Flocks A-1 and A-2, though of different genetic strains, were in the "A" house simultaneously. However, the remaining four flocks, in the "B" and "C" houses, were not in existence at the same time; the "2" flock succeeded the "1" flock. Thus, by the time Flocks B-2 and C-2 reached the complex, their predecessors (B-1 and C-1) had completed their laying cycle and been sold for meat.

The pertinent facts as to each flock are presented in the following table:

<i>Flock Number</i>	<i>Color</i>	<i>Age When Housed*</i>	<i>Period of Damages</i>	<i>Amount Claimed</i>
A-1	Brown	20 weeks	April 1971-April 1972	\$ 15,216.03
A-2	White	20-21 weeks	June 1971-May 1972	48,246.08
B-1	White	20 weeks	July 1970-Aug. 1971	30,430.61
B-2	Brown	20 weeks	May 1972-Feb. 1973	71,717.05
C-1	White	20 weeks	Jan. 1971-Feb. 1972	68,927.40
C-2	White	20 weeks	July 1972-July 1973	80,060.26
Dostie (Maine flock)	White	20-21 weeks	Oct. 1971-Sept. 1972	22,167.31
				<hr/> \$336,764.74

Plaintiff succeeded in getting to the jury as to all seven flocks as if they were one, thus obliterating the fundamental and highly significant differences between them. The flocks actually fall into at least three discrete groupings, each raising independent considerations that were overlooked by the court's rulings and the jury's zeal: (a) flocks B-2 and C-2, which were the *only* flocks alive in the complex when the problem that led to this lawsuit was diagnosed; (b) flocks A-1, A-2, B-1 and C-1, which were no longer in existence at that critical time; and (c) the Dostie flock, the single flock located in Maine. The failure of the court below to make necessary distinctions among the flocks—but instead to treat this case as if all the chickens had simultaneously developed a contagious disease—was itself error, and highly prejudicial to defendant.**

* Mrs. Leriche established that the flocks in issue were 20 weeks old when put into the laying houses. Her testimony was given on the basis of plaintiff's own records, which were before her as she testified (A251-56; E1-6; E8).

** Dr. Snetsinger testified that Fatty Liver Syndrome is a spotty thing, and it would have been "highly unusual" for all these strains in different locations to have Fatty Liver Syndrome (A339).

(a) "The Fat Flocks": Flocks B-2 and C-2.

Flocks B-2 and C-2 have three facts in common. First, they were plaintiff's only flocks in the complex at the time a problem of obesity or Fatty Liver Syndrome was diagnosed. Second, they were the only flocks seen by plaintiff's star trial witness, Dr. Hoffman; his opinions as to the other flocks were based on reading reports on the Dostie flock and making assumptions as to all the other flocks. Finally, they were the only flocks in issue that were fed defendant's new Life Cycle feed from the time they were hatched.

A problem in B-2 was diagnosed in August 1972 after these hens had been in the laying houses for four months and passed their peak production. On August 8, Mr. Morrill first examined these birds and, finding obesity, took samples from B-2 to Dr. Murray at the University of Vermont. Dr. Murray confirmed the finding and also reported Fatty Liver Syndrome (A26-27; E9-14). On August 28, 1972, Dr. Hoffman saw B-2 and also concluded these birds were obese. Veterinarians he consulted reported that the birds suffered from Fatty Liver Syndrome (E15-18).

These were the very first reports during the period in issue that plaintiff's birds were fat (A135). Prior to August 1972, no one observed that the birds were fat. In the reports of checkups which had routinely been done on plaintiff's flocks in the complex prior to August, there had been only one reference to any excessive weight, a condition which apparently disappeared by the next examination. There was not one reported incidence of Fatty Liver Syndrome (E40-61). Suddenly, in August 1972, two veterinarians (one of whom had regularly examined the flocks and reported on them before), a nutritionist and a feed manufacturer observed that the B-2 birds they saw were markedly or grossly obese, and diagnosed Fatty Liver Syndrome. According to Mr. Morrill and Dr. Murray, the extreme obesity in B-2 was something that could easily be

seen, even without opening up the hens (A26; A40). Plaintiff's witness Mr. Mercia could see that the birds were very, very fat, even as he just walked through the hen house (A315). Neither he, nor Mr. Morrill nor Dr. Murray had ever seen fatter hens this age.

When defendant's representatives visited plaintiff's farm in August 1972, in response to a complaint, they saw only B-2. Mr. Leriche would not permit them to see any other flock (A150-51; A153).

In August 1972, flock C-2 was just entering on its laying cycle. Despite the attention being focused on B-2, C-2 went unnoticed for another month. Plaintiff's witness Mr. Morrill testified that no complaint was made to him regarding C-2 until November 10, 1972 (Tr. 79). By this time, C-2 had been off defendant's feed (and presumably on some other feed) for three weeks and the present lawsuit was underway. On November 16, 1972, Dr. Bryant diagnosed Fatty Liver Syndrome in C-2, expressing the firm belief that this flock was headed in the same direction as B-2 (E18).

Although the C-2 hens were fed defendant's feed for less than three months, plaintiff claimed and was awarded damages on C-2 through July 1973, nine months after these birds started eating a competitor's product.

(b) "The Phantom Flocks": Flocks A-1, A-2, B-1 and C-1.

By August 1972, when the present controversy had its origins, flocks A-1, A-2, B-1 and C-1 had already passed quietly out of existence. While Mr. Leriche testified he had told defendant's salesman he was unhappy with production rates on these flocks, the fact remains that he made no mention of fat birds (A143; A320). No complaint was made about low production to defendant's Customer Service Manager at the mill until the present controversy (Tr. 1356).

Samples from each of these flocks had been routinely examined throughout their lives at the University of Vermont. While birds from B-2 and C-2—the fat flocks—were found by plaintiff's experts to be obese or suffering from Fatty Liver Syndrome (which became the platform for inferences as to a defect in the feed and causation), no one could urge this same conclusion as to the phantom flocks. Such a conclusion was flatly contradicted by the sound, reliable record compiled long before this litigation commenced.

Twenty reports were prepared, beginning November 20, 1970 and continuing up to July 1972 (E40-61). Well over one hundred birds were examined. While many diseases were noted—diseases not attributable to the feed (A391)—in only one report was there mention of excess weight, in birds who were also suffering from other illness. Three weeks later, samples from this same flock were examined, and no excessive weight was noted (A394-95). If any of plaintiff's birds had been excessively fat, the examining doctor testified that some notation would have been made on his reports (A392-93). Also, if there had been complaint of low production on these birds, he probably would have mentioned that fact in his reports (A396), as he did in the later reports on B-2 and C-2. In all the diagnostic reports concerning these flocks, there is no mention of low production and only one reference to excess weight.

The contrast is significant between the vivid descriptions of obesity in B-2 and C-2 and the testimony and written reports on the phantom flocks. If the condition of the phantom flocks was anything like B-2 and C-2, surely someone would have noticed it.

A special problem existed in one of the phantom flocks—C-1. As the pullets were entering into the laying cycle, these birds were injected with defective vaccine, causing them to develop Marek's disease, a lethal cancer in chickens. Marek's disease unquestionably can reduce egg pro-

duction (A80). Some 4,000 birds out of a flock of 33,000 had to be replaced at the time when the flock was approaching peak egg production—a critical time in the laying cycle. The replacement birds were only 20 weeks old, and just beginning to lay, when received from the hatchery (A361-62). There was no evidence as to how they were raised, what they were fed (Tr. 967-68), or their condition. By plaintiffs' own admission, for the first three to four weeks, these new birds would not produce as well as the older birds they replaced (A363).

Thus, as to C-1, there is no doubt that their egg production was reduced by Marek's disease and then by the young replacement birds.

(c) The Dostie Flock.

"The Dostie flock" refers to approximately 40,000 of plaintiff's White Leghorns which were transported from Vermont to Maine and housed on a subcontract basis with Mr. Dostie on his Maine dairy farm. This was Mr. Dostie's first experience raising hens (A146). These hens thus were located in a different state from plaintiff's six Vermont flocks, in different houses on a different farm, and under different environmental and management conditions. Additionally, while they too consumed defendant's feed, from the outset they received an 18 percent protein ration (A136a; A366) as opposed to the 15 percent ration being fed in Vermont, meaning that the energy content of their feed would have been lower.

Three additional facts stand out about the Dostie flock.

First, the "flock" was not made up of the same chickens during the entire damage period. There had been abnormally high mortality in this flock from the time they arrived in Maine, associated with the trip from Vermont and flock disease diagnosed as cancer. To compensate for the unusually high number of deaths, 5,980 new hens were in-

troduced in the midst of the year (Tr. 774; A368-69). Where these birds had come from, who had raised them, their growing conditions, and particularly what they had been fed prior to their arrival on the Dostie farm were never definitively established (A365). Plaintiff testified that they included the 4,000 new birds which had been added one year before to C-1 (A365). By plaintiff's own account, therefore, these birds would have been one and one-half years old when they were sent up to Dostie from C-1, and their normal egg-laying cycle would have been completed by this time.

Second, the Dostie flock was molted twice during the period of damages, just a few months after they had entered the laying cycle (A96-99; A367; A398-401; E24). "Molting," a procedure whereby egg production may be extended beyond the normal laying cycle, requires a precipitating cause, such as removal of feed or water. Deliberately molting hens just entering upon the laying cycle would have been highly irregular, and plaintiff knew of no explanation for the fact that it was done twice. Indisputably, molting would have temporarily reduced egg production (A17; A366-67), and therefore must have brought down the production averages on this flock. The Vermont flocks had no similar experience.

Third, the medical reports on the Dostie flock during the damage period read like an encyclopedia of chicken diseases. Plaintiff introduced nine separate diagnostic reports which had been prepared on this flock at the University of Maine between October 28, 1971 and October 24, 1972 (E19-28). Cancer (infectious Marek's disease or lymphoid leukosis, both of which are viral-induced tumors) was diagnosed in the flock. Of the 85 birds examined in the damage period, more than half showed cancerous lesions. The doctor who prepared these reports testified that any one of the diseases he identified in the Dostie flock (cancer, visceral gout, tendonitis) could cause reduced

egg production (A80; A91). There can be no doubt based on the record that as these hens embarked on their egg-laying cycle, their production averages were reduced by diseases for which defendant could not conceivably have been responsible.

It was not until halfway into the period for which plaintiff recovered damages that this diseased flock first showed Fatty Liver Syndrome. The initial diagnostic reports did not even mention any fatty condition, which would have been noted if it had existed (A82-83). Evidence of cancer, however, persisted throughout the entire damage period. The findings of defendant's own doctors beginning in March 1972 similarly showed that there was cancer in the Dostie flock (E36).

Although defendant's veterinarian Dr. Eldridge talked to Mr. Leriche about problems in the Dostie flock during the Spring of 1972, there is no evidence that Mr. Leriche at that time expressed any dissatisfaction to him about the hens at the Vermont complex.

Proof of Injury.

For each of the seven flocks, plaintiff introduced a form prepared by a hatchery showing an ideal egg production curve. The forms themselves were called "Performance Goal Charts." Plaintiff's witnesses acknowledged that, while the rates of production were surely possible, these forms were promotional and intended to present the particular breed in the best possible light (A227-28; A295). As Dr. Hoffman testified, the charted curve reflected the "genetical possibilities" of a particular breed (Tr. 698). Each of the charts assumed that the pullets went into the laying houses at 22 weeks.

On these forms, plaintiff charted its own consistently lower rate of egg production. By this manner, plaintiff purportedly proved that it had sustained injury.

In one instance—one of the two largest damage flocks—plaintiff's production curve was not even placed on the proper chart (E4). For flock B-2, plaintiff used a white bird chart instead of the appropriate brown bird chart, where idealized production would have been significantly lower. Thus, the jury was shown a far more dramatic picture of production losses than the facts could possibly have warranted.

Although plaintiff had been in the egg-producing business for seven or eight years, there was no proof as to its own track record. It did not prove that, in its own prior experience, it had ever succeeded in achieving the full genetical possibilities envisioned by these charts, with one exception. Plaintiff proved that, of all the hundreds of thousands of hens it owned during its many years in the business, in one instance—the homosote building—it did realize the breeder's performance goals. A portion of this flock had been raised with pullets that became the B-2 flock; the homosote hens were fed by another feed manufacturer. The homosote operation differed from the complex. The hens were all in cages in the complex, but in the homosote building they were not (Tr. 357). The building itself was of a different type construction from the complex, with different atmosphere, supervision, and more reliable egg collection methods (A143-45; A299; A310-11).

Indeed, the only evidence of plaintiff's track record was Mr. Leriche's testimony that he had always had poor production (A129; A130; A132).

Proof of Defect and Causation.

Both a defect in the feed and causation of lowered production were proved by inferences from the lowered production itself and the findings of obesity or Fatty Liver Syndrome in B-2, C-2 and the Dostie flock. Indeed, plaintiff's counsel said that the only way it could prove its case was by inferences (A376).

The proof varied with respect to each of the three discrete groupings. As to B-2 and C-2, where Drs. Hoffman, Murray and Bryant had personally diagnosed an unhealthy condition, these witnesses inferred from the condition that the feed was at fault, and that the condition caused the injury. These witnesses, as well as defendant's witnesses, also suggested alternative causes for the obesity, Fatty Liver Syndrome and lowered egg production.

In Dostie, as in B-2 and C-2, there were medical reports in which Fatty Liver Syndrome was diagnosed. But these differed significantly from the B-2 and C-2 findings, in that numerous other diseases were identified in these chickens, which the examining doctor himself testified could have reduced egg production.

Finally, the evidence as to the phantom flocks became even more inconclusive. Whereas B-2, C-2 and the disease-ridden Dostie flock had been diagnosed as obese or suffering from Fatty Liver Syndrome, no such finding was made as to the four remaining flocks. In this instance, the bridge leading to liability was furnished by Dr. Hoffman. In answer to a hypothetical question, he opined that given the same feed, plump pullets, similar low production and no disease, the birds would have been too fat, which would have been caused by the feed, which would have caused low production (A209). Over objection, the court below permitted this testimony, although it lacked proper foundation in the record. The prejudice to defendant from this erroneous ruling goes even beyond the phantom flocks. Plaintiff undeservedly and improperly was permitted to put a record of seven apparently similar incidents before the jury which, in its cumulative effect, was highly damaging.

Proof of Damages.

In calculating damages, plaintiff worked from the Goal Performance Charts prepared by breeders (A235-48).

From these charts, plaintiff arrived at a number for "Dozen Expected" each month. Thus, without regard to its own track record, and the diseases and other problems in its flocks, plaintiff calculated for each month of the damage period what the "Dozen Expected" would have been if every hen achieved its performance goal or, in the words of plaintiff's witness, if every hen realized its "genetical possibilities."

As the next step, plaintiff assembled all of the records of payments for eggs it had purchased during the damage period. Plaintiff computed an average cost per month for each dozen eggs purchased. Plaintiff then subtracted the monthly actual "Dozen Received" from "Dozen Expected" to arrive at a monthly figure for "Loss in Dozen." Finally, the average monthly cost actually paid for a dozen eggs was multiplied by the idealized "Loss in Dozen" for each month. The resulting figure was \$336,764.74, which is the figure that went to the jury.

The jury returned a verdict for \$298,870, inexplicably \$37,894.74 short of the amount claimed.

ARGUMENT

I.

The Court below erred in excluding evidence as to the absence of complaints.

Plaintiff's central contention was that, over the three-year period in issue, there was a defect in the nutritional standards or design of defendant's chicken feed, which was more specifically defined in the course of the trial as a defect in the amino acid balance of the formula (A380). To meet this contention, defendant sought to prove that for the past five years, on a formula with standardized nutritional levels throughout the nation, defendant did not receive a

single complaint (other than plaintiff's) regarding the nutritional standards of its poultry feed. This evidence was highly material and should have been admitted.

In this case in particular, with plaintiff's proof as to defect and causation based largely on a series of inferences, evidence as to the absence of similar complaints from other buyers of this standardized product was especially significant. Defendant was foreclosed from meeting plaintiff's inferences by reliable evidence of field experience. In excluding this evidence, the court seriously prejudiced defendant and committed reversible error.

Plaintiff itself recognized the relevance and importance of evidence as to the experience of defendant's other customers. In interrogatories, plaintiff asked for and was furnished a list of all fifty of defendant's poultry customers who were serviced from defendant's St. Johnsbury, Vermont plant from January 1970 to July 1973, and a list of those customers feeding 5,000 birds or more (A8-14). There can be no doubt that if plaintiff had found evidence of similar experiences, it would have produced this proof. Such evidence has been commonly accepted where the sampling offered—as in the present case—has been sufficiently broad to demonstrate its reliability and relevance. See, e.g., McCormick, *Evidence* § 200 at p. 476 (2d ed. 1972); *Patton v. Ballam*, 115 Vt. 308, 58 A.2d 817 (1948); and *Boguski v. City of Winooski*, 108 Vt. 380, 187 Atl. 808 (1936) (discussed *infra* at p. 29).

Defendant offered to prove the absence of complaints through two witnesses—its national representative to whom any complaints would have come throughout the country, and his New England counterpart, to whom any complaints in that area would have come (A377-90). The offer was clear, specific and definite.

“[Plaintiff's Counsel]—All you are saying, he never, in the last 5 years, apparently, had any com-

plaint which required his getting involved in checking the formulas except this one?

"[Defendant's Counsel]—That is right." (A382)

More than one million tons of defendant's chicken feed had been sold annually during this period (A349). Plaintiff's annual purchases during 1970, 1971 and 1972 averaged a few thousand tons per year.

The court below excluded this testimony because it ruled there were too many "variables." "You have people scattered all over the country and all over the world and using different types of feed, or different ingredients in the feed, depending on the portion of the country they are in . . ." (A389).*

By so ruling, the court ignored or misconstrued the very basis of plaintiff's claim and its proof. Plaintiff's witness Dr. Hoffman, who is a poultry feed manufacturer as well as a poultry nutritionist, testified that the feed manufactured by defendant will be basically the same, even though there may be variations in the actual ingredients, even though the feed may contain 14, 15 or 18 percent protein, and even though it may be called Life Cycle, Pro-Lay or any other trade name. Dr. Hoffman was of the view that the crucial concern was not with the actual ingredients of the feed, which he recognized might change weekly, but with the "perimeters," or standards, or "philosophy" of the feed manufacturer (Tr. 692; A234).

Indeed, Dr. Hoffman's expert opinion as to the cause of lowered production in flocks he had never seen rested upon the necessary assumption that, while the actual ingredients of the feed may have varied over the many months in issue,

* Even if this ruling were proper as to the absence of complaints nationally—which defendant disputes—still there would be no basis for excluding evidence as to the absence of complaints in the New England area.

the feed was consistently the same (and consistently the cause of plaintiff's problem) precisely because it was manufactured according to the same standards or philosophy.

Dr. Hoffman's testimony that all defendant's poultry feed would be the same because of its philosophy goes even beyond the point. Whether or not defendant's feed is *always* the same, it ill behooves this plaintiff to argue that there were too many variables to make the absence of complaints probative.

Dr. Snetsinger, who has charge of Ralston Purina's General Poultry Research Division, testified that he sets up the nutrient specifications (*i.e.*, the balance of calcium, phosphorus and amino acids to energy), and that these specifications are uniform throughout the entire country. While the actual ingredients chosen for the chicken feed would depend on then current prices and the region of the mill which actually made the feed, defendant's nutrient levels at any given time would be standard (A159-63; A175-76; A347-48).

Since the nutrient balance of defendant's feed was a pivotal question in this case, and since the nutrient balance received by all of defendant's customers at a given time was indisputably the same, the court's exclusion of this evidence on the basis of "variables" in the ingredients was plainly wrong. In this case, as in other design cases (as opposed to cases involving single incidents of contaminated food or defects in a particular automobile), evidence as to the absence of complaints should have been admitted.

"It is still true, however, that the design cases are perhaps the ones most hard fought by the manufacturer. This is so because unlike the construction defect case, the plaintiff is not just attacking the single specific product that caused his injuries. He is in effect claiming that any product made by the defendant designed in the same way is defective." Frumer-Friedman, *Products Liability*, 109.2.

For example, in *Simmons v. Gibbs Manufacturing Co.*, 170 F. Supp. 818 (N.D. Ohio 1959), *aff'd*, 275 F.2d 291 (6th Cir. 1960), plaintiff was unable to show that defendant had improperly designed a toy top in light of the following convincing proof:

"Mr. Streb [defendant's vice-president] testified that in the ten-year period during which over 7,500,000 of these tops had been manufactured and sold no case had come to his attention when the tack had ever come loose and caused injury. This is persuasive that the top was properly designed. *Rathbun v. Humphrey Co.*, 94 Ohio App. 429, 435, 113 N.E.2d 877." *Id.* at 822.

See also *Schindley v. Allen-Sherman-Hoff Co.*, 157 F.2d 102 (6th Cir. 1946).

A conclusion that the product sold to plaintiff was defectively designed necessarily required the secondary conclusion that this same product sold to other customers would be similarly defective. Plaintiff's objections—seized on by the trial court—that there were untold variables, should not foreclose this avenue of proof to defendant. As demonstrated, the court's conclusion that there were variables in the feed misses the point of plaintiff's issue; this case was about amino acid balance, which was standardized in the feed, and not about corn or other ingredients which may have varied.

A second circumstance making the absence of complaints highly probative in this case is that all chicken feed purchased from defendant was obviously put to the very same use by all defendant's customers, including plaintiff. It was of course fed to chickens. The experience of plaintiff

would necessarily have been just like that of defendant's other customers.*

This case is therefore clearly distinguishable from breach of warranty cases which turn on a particular item purchased by plaintiff or a plaintiff's individual use of the product. For example, in *Frank R. Jelleff, Inc. v. Braden*, 233 F.2d 671 (D.C. Cir. 1956), plaintiff had been seriously burned when a brunch coat she was wearing came in contact with an electric stove and ignited. The fact that on 54,000 of these garments sold there was no such complaint would be inconclusive since there was nothing to say that any of the 54,000 wearers came in contact with an electric stove. As this Court observed in *dictum* in *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 fn. 1 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972), absence of complaints in such cases would be "rarely probative on the warranty issue."

By contrast, in the present case, not only was the product standardized in formula, but also every pound of it would have found its way into a chicken.

In a case constructed upon circumstantial proof, evidence as to the absence of similar complaints from other customers would have particular relevance and significance. It is precisely because of the nature of this plaintiff's proof that the exclusion of defendant's evidence was so highly prejudicial.**

* Any difference in the quality of poultry management by defendant's other customers would be insignificant. If defendant's other customers were poor managers, their egg production results would have suffered, and there would have been all the more reason for complaints. In any event, the differences—if indeed there were any material differences—would affect weight of the evidence, and not its admissibility.

** Just as the presence of similar incidents fortified inferences as to defendant's fault in cases such as *Patton v. Ballam*, 115 Vt. 308, 58 A.2d 817 (1948), and *Boguski v. City of Winooski*, 108 Vt. 380, 187 Atl. 808 (1936) (both discussed *infra* at p. 29), so the absence of similar complaints should be permitted for the contrary proposition.

Plaintiff's counsel summarized its complaint as follows:

"Our only complaint with respect to feed, as I indicated earlier, we feel there is evidence in this case, if you want to think backwards from the results of the program, to indicate that the amino acid balance was deficient, because we had the results." (A381) Plaintiff stated that it was unable to prove by direct evidence that the feed was defectively designed and could only establish its contention by inference. Defendant's attorney replied, "Then we have to disprove it by inference." (A376)

In erroneously refusing to permit defendant to introduce proof as to the absence of complaints, the court below foreclosed a critical element in the defense. The purport of this evidence was not to show due care in manufacture, which of course was not an issue once this case was limited to breach of warranty. However, in a situation where it was necessary for the jury to choose among competing inferences and assumptions of experts, this evidence of extensive actual field experience would have tended to show that the inferences urged by plaintiff were without merit.

In *Denman v. Armour Pharmaceutical, Inc.*, 322 F. Supp. 1370 (N.D. Miss. 1970), plaintiff sought damages from the manufacturer of hog cholera vaccine when its hogs, after vaccination, suffered an outbreak of the disease. The court noted:

"Concluding that . . . [plaintiff's] pigs died because they were innoculated with a defective product would be mere conjecture, and would ignore all other relevant considerations. *This is particularly true since no cases of hog cholera were reported to Dr. Denman by other clients whose pigs he vaccinated with doses . . . identical to those here involved. These facts strongly rebut any notion that some of plaintiff's pigs were vaccinated with a defective product. More reasonable explanations would be that something was wrong with*

these particular pigs at the time of their injection or else the vaccine was improperly administered." *Id.* at 1376. (Emphasis added.)

If plaintiff had proved a specific defect in defendant's product, defendant could have established its defense by rebutting this evidence. But in this case, defect and causation were proved by inferences from proof that some chickens were obese and that all of the flocks experienced disappointing production. In order to rebut plaintiff's inferences leading to liability, defendant should have been permitted to show that of all its other customers, who cumulatively received one million tons annually of feed manufactured by the very same nutrient standards as plaintiff, not one complained of a similar experience. As the court observed in *Rathbun v. Humphrey*, 94 Ohio App. 429, 113 N.E.2d 877 (1953):

"To hold that plaintiff could create such an issue so general and comprehensive in its nature and implications and to deny the defendant the right to meet it by the test of experience would not be in accord with sound logic or judicial fairness." *Id.* at 880-81.

By its ruling, the court erroneously and unfairly permitted plaintiff to enjoy two inconsistent positions. The court excluded evidence as to similar experiences for the stated reason that there were too many variables in defendant's feed yet, at the same time, it sustained a claim as to the phantom flocks which assumed that defendant's feed was the same because it was the product of a single "philosophy."* Because of this error, which went to the heart of defendant's case, a new trial should be granted.

* Defendant contends that this court erred in *both* rulings. While the feed formula was standardized at any given time, making the absence of similar complaints highly probative, the feed changed during plaintiff's damage period, when the Life Cycle program was introduced in 1971.

II.

Judgment should be entered for defendant because plaintiff failed to adduce sufficient evidence as to defect and causation to raise a question for jury decision.

On the basis of all the evidence favoring plaintiff, as well as all other uncontradicted evidence, defendant's motion for judgment as a matter of law should have been granted. *Simblest v. Maynard*, 427 F.2d 1, 5 (2d Cir. 1970).

Plaintiff had the burden of proving its contention that defendant's feed was defective, and that this defect caused its injury. *Magnolia Milling Co. v. Clark*, 223 P. 1042 (Wash. 1924); Prosser, *Handbook of the Law of Torts*, Sec. 103, pp. 671-72 (4th ed. 1971).

Plaintiff attempted, entirely by inference, to discharge its fundamental burden of proving that the chicken feed was defective, and that its injury was caused by that defective feed. No specific defect in defendant's feed was proven as the cause for plaintiff's loss. Indeed, plaintiff openly conceded that while the nub of its claim was that there was a problem of amino acid balance in Ralston Purina's feed,

"We can't prove it except by inference. . . ." (A376)

Thus, plaintiff did not even undertake to offer any direct proof of its contention.

As to the feed itself, the only direct proof about its content was exculpatory. The feed contained the protein levels required by law (A166). Its energy content was within the ranges recommended by all of plaintiff's authorities (A330), and its amino acid levels were satisfactory (A331-32). There was no proof of negligent manufacture. In fact, plaintiff abandoned any claim of negligence after hearing

defendant's proof of its meticulous standards of manufacture (A402-03). There was no evidence of any spoilage or foreign substance in the feed, and no question of misrepresentation as to the protein content of the feed (A376).

The only proof was proof of injury—that during a three-year period, plaintiff's hens produced eggs at somewhat lower rates than the Performance Goals envisioned by breeders of chicks. Also, in three of the seven separate flocks in issue, there was evidence that the hens had Fatty Liver Syndrome or were obese. Thus, from the egg production rates and limited proof of fat in three flocks only, plaintiff succeeded in creating generalized propositions that the feed was defective and that this defect caused disappointing egg production in all seven flocks.

The cornerstone rule in products liability cases is that proof of injury alone is insufficient to raise a rational basis for inferring a defect. *Helene Curtis Inc. v. Pruitt*, 385 F.2d 841, 853 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); *Poovey v. International Sugarfeed No. 2 Co.*, 191 N.C. 722, 133 S.E. 12 (1926). Yet, this plaintiff was permitted to get to the jury as to at least four of the seven flocks on injury alone.

Establishing the liability of a manufacturer for injury caused by animal feed requires proof that there was some unwholesome ingredient or condition in the feed which caused the injury alleged. While the existence of a harmful ingredient or condition may become the basis for an inference that the condition caused the injury alleged, plaintiff at the outset must prove a defect. See, *e.g.*, *McMillen Feeds, Inc. of Texas v. Harlow*, 405 S.W.2d 123 (Tex. Civ. App. 1966) (demonstrated cottonseed meal in turkey meal); *Burns v. Ralston Purina Co.*, 210 Ga. 81, 77 S.E.2d 739 (1953) (demonstrated presence of molded feed); *Jones v. Silver City Mills, Inc.*, 250 N.C. 527, 108 S.E.2d 917 (1950) (demonstrated presence of nicarbazin in chicken feed);

Patton v. Ballam, 115 Vt. 308, 58 A.2d 817 (1948) (demonstrated food spoilage).

Plaintiff failed to prove its claimed defect in the nutritional standards of the feed. Protein levels of defendant's feed were in the record, and of course subject to specific challenge. Defendant's nutritionist responsible for designing its feed formula testified as to the energy content of the feed and his satisfaction with the amino acid levels (A330-32). Plaintiff should have been required to come forward with proof of an actual defect in nutritional standards, as claimed.

Plaintiff not only failed to prove any defect, but also the evidence adduced did not provide a legitimate basis for a finding by a jury as to defect or causation. For circumstantial evidence to be sufficient to warrant a finding of fact, it must (1) lead to the conclusion with reasonable certainty and (2) have sufficient probative force to constitute the basis for a legal inference, and not for mere speculation. 32A C.J.S., Evidence 1039, pp. 753-55. As the court held in *Armstrong v. Commerce Tankers Corp.*, 311 F. Supp. 1236 (S.D.N.Y. 1969), *aff'd*, 423 F.2d 957 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970):

"Evidence which presents no more than a choice of probabilities is not deemed substantial enough to warrant submission of a case to the jury. Liability cannot be predicated upon mere conjecture or speculation as to the proximate cause of damage. . . .

"A mere possibility of such causation is not enough and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. (Citations omitted.)" *Id.* at 1241.

See also *Denman v. Armour Pharmaceutical Co.*, 322 F. Supp. 1370 (N.D. Miss. 1970); *Helene Curtis Industries v.*

Pruitt, 385 F.2d 841, 851 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); and *Pittman v. West American Ins. Co.*, 299 F.2d 405 (8th Cir. 1962).

Plaintiff failed to make a submissible case for the jury on circumstantial evidence because (1) the circumstantial evidence did not point with reasonable certainty to the conclusions urged, and (2) among the possibilities which emerged to explain plaintiff's injury, plaintiff did not provide any rational basis for blaming defendant's feed.

The nature of the injury (less-than-hoped-for egg production) and the extended time period involved (three years) do not point with reasonable certainty to a problem in defendant's feed. It was not as if widespread death, injury, or even a proven change in condition occurred just after ingestion of defendant's feed. For example, in *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971), a case relied on below by plaintiff, an inference of causation arose from the fact that cattle had maintained a weight gain level which dropped just after plaintiff began feeding defendant's new feed supplement. In *Jerry v. The Borden Co.*, 172 N.Y.L.J. 1, col. 7 (July 29, 1974), a strict liability case decided this past summer by the New York Supreme Court, Appellate Division, an 11-year-old child became permanently bald after using defendant's hair straightener. As the court observed, while the consumer unquestionably has the burden of proving a defect in the design of the product, sometimes the injury is so startling and immediate that the consumer's burden is aided "by establishing a causal connection between use and result together with expert testimony as to the nature of the ingredients used and their propensities. In other cases, where the use of the product does not result in such a bizarre injury, the proportions of the defect must be described in greater detail and demonstration." In the present case, where the nature of the injury was not bizarre, and where the injury did not develop immediately

upon the use of a new product, plaintiff's proof of defect must be all the more specific.

The evidence established a number of possible reasons for the obesity, as well as the egg production rates, and the jury had no legitimate basis in the evidence for choosing among the possibilities. The evidence left the jury to conjecture and speculation as to both defect and proximate cause of damage.

In *Patton v. Ballam*, 115 Vt. 308, 58 A.2d 817 (1948), the Supreme Court of Vermont described plaintiff's burden thusly:

"There must be created in the minds of the jurors something more, of course, than a possibility, suspicion, or surmise, but the requirements of the law are satisfied if the existence of this fact is made the more probable hypothesis, when considered with reference to the possibility of other hypotheses." *Id.* at 821.

Proof of actual spoilage in defendant's mink feed coupled with evidence that others had suffered similar injury was deemed sufficient in that case to permit the jury to draw a rational inference that the feed was the source of the damage to plaintiff's animals, rather than other possible causes. In *Boguski v. City of Winooski*, 108 Vt. 380, 187 Atl. 808 (1936), plaintiff proved that city drinking water was in fact contaminated and that others drinking city water became similarly afflicted. Again, this proof furnished some rational basis for the inference that defendant caused plaintiff's damage, rather than other possible causes.

Thus, both *Patton* and *Boguski* demonstrate that an inference of causation may be permitted from circumstantial evidence, but only upon proof of a defect and a legitimate basis for permitting a jury to make a rational choice among the possibilities.

In the present case, there was no proof of defect and no evidence that any other purchaser of defendant's feed—and indeed there were many—had the same experience as plaintiff.

When the inferences as to causation are based on expert opinion (as in the present case) rather than on common experience (as in *Patton and Boguski*), it is even more essential that plaintiff establish its hypothesis as the more probable, in order to take the case out of the realm of conjecture and place it in the field of legitimate inference. *Denman v. Armour Pharmaceutical Co.*, 322 F. Supp. 1370 (N.D. Miss. 1970); *Quaker Oats Co. v. Davis*, 232 S.W.2d 282 (Tenn. App. 1949).

Two cases on facts strikingly similar to the case at Bar illustrate this point.

In *Ralston Purina Co. v. Edmunds*, 241 F.2d 164 (4th Cir. 1956), *cert. denied*, 353 U.S. 974 (1957), plaintiff claimed that a change in defendant's feed caused its turkeys to produce fewer eggs than anticipated and otherwise hampered its breeding operation. A jury verdict for plaintiff was reversed, and judgment entered for defendant. Even though there was no dispute as to the alleged defect—unlike the present case—since defendant admitted the change in feed complained of, the court concluded that the causal relationship between the defect and the injury had not been established with requisite certainty to create a jury question. Causation was, in the court's words, "the crucial issue:"

"In attempting to show that the change in the pellet was the source of the turkeys' malady, plaintiffs produced considerable expert testimony, which failed, however, to show a *probable* relationship between the claimed cause and the result complained of. It was effective, at most, to indicate that under each of the three alternative theories, there was a *possibility* that

the feed *could* have caused the trouble. Furthermore, the testimony of plaintiffs' own experts indicated other possible causes, disease and excessive lighting, which are not negatived and for which the defendant would not be liable. Alternative possibilities as to the cause of an event are not enough where the defendant is liable under one and not under the others and where no basis for a rational choice among the alternatives is provided. They invite sheer conjecture and speculation and hence raise no question for the jury." *Id.* at 167. (The Court's Own Emphasis.)

In the case at Bar, as in *Edmunds*, plaintiff also sought to forge the link between injury and liability by expert testimony. Judge Sobeloff, in the *Edmunds* opinion, emphasized that, particularly in a case where expert testimony is heavily relied on to establish causation, evidence showing a probability rather than a possibility would be essential. Were this not so, the jury would be relegated to speculation and conjecture, without any rational basis for choice on this crucial issue. *Id.* at 168.

In *Thomas v. Kasco Mills*, 218 F.2d 256 (4th Cir. 1955), a turkey breeder sought to establish that defects in the feed caused unsatisfactory egg production. The breeder used the feed over a two-year period and, not until the manufacturer refused to make further deliveries, was there any complaint as to its quality. Again, the vital link between egg production and the feed was supplied by expert testimony.

In agreeing that the evidence did not furnish substantial basis for a finding on the crucial issue of causation, and affirming a judgment for the feed manufacturer, the court wrote:

"The evidence of unusual losses was in itself insufficient, for there were many conditions other than food which affected the productivity and growth of the

flocks; and the expert testimony was too uncertain to supply the missing link. . . . When the uncertainty of all the evidence is considered with the additional fact that the defendant, a grower of long experience, continued to use the feed for a period of more than two years, and only raised the defense after the Kasco Company had declined further shipments, it is clear that there was no error in directing a verdict for the amount of the plaintiff's claim. It is well settled that if the evidence as to a fact is so slight as to furnish only basis for a conjecture, the existence of the fact should not be submitted to the jury." *Id.* at 258.

See also *Green v. Ralston Purina*, 376 S.W.2d 119 (Sup. Ct. Mo. 1964).

On the evidence, it is apparent that plaintiff failed to adduce sufficient evidence to raise a jury question.

While it is plaintiff's burden to prove causation, and not defendant's burden to establish another cause for the disappointing egg production rates plaintiff experienced, the ensuing sections demonstrate that the circumstantial evidence does not support the conclusions urged with reasonable certainty, that there were equiprobabilities for which defendant would not be liable, and that no rational basis was provided for a choice among the alternatives. The jury was left to mere conjecture and speculation.

A. The Evidence as to the Cause of Fatty Liver Syndrome or Obesity In Three Flocks was Equivocal.

As to the three flocks actually examined, plaintiff's experts could not agree on precisely what was wrong with them.

The prevailing thought—expressed by Dr. Gibbs, Dr. Murray and Dr. Bryant—was that the three flocks suffered from Fatty Liver Syndrome. The veterinarians and nutritionists agreed that Fatty Liver Syndrome is an im-

precise condition—a “veterinary catchall” for a number of symptoms—with its actual cause unknown (A88; A173; A266). Fatty Liver Syndrome, in the words of Dr. Hoffman, “covers a wide gamut of things” (A223). As plaintiff’s witness Dr. Bryant testified, “until more research work is done on [Fatty Liver Syndrome] and the cause completely established, it won’t go into the nomenclature as such” (A78).

There was speculation among plaintiff’s experts that high energy in feed may be the cause of Fatty Liver Syndrome. However, none of these witnesses could identify what level of energy would be too high (A72). The only testimony regarding the energy content of defendant’s feed was that it was not too high, but was within the energy ranges recommended by plaintiff’s authorities (A330-31). Plaintiff’s witness Dr. Gibbs testified:

“I don’t think anybody really knows satisfactorily, has elucidated the cause of . . . the fatty liver syndrome. The current theory, as I understand it, is that high energy intakes in feed will predispose or bring on this condition. I think it’s still, though, somewhat in an experimental stage.” (A88)

Significantly, despite a number of efforts over an eighteen-year period with various levels of energy in feed, no one has been able to reproduce Fatty Liver Syndrome experimentally, except by excessive force-feeding (A224; A335-39). As defendant’s witness, Dr. Snetsinger, testified:

“This is a field problem, and a number of people have tried to reproduce fatty liver syndrome, and roughly from 1956 to 1974, that is 18 years, no one has ever been able to reproduce fatty liver syndrome, experimentally. I think if it were a matter of just energy levels or controlled feeding of birds, or anything like that, that surely somebody within that time span of 18 years

—and this has been rather extensively investigated—would have been able to produce the fatty liver syndrome.” (A336-37)

Fatty Liver Syndrome, as the experts agreed, stands as an industry problem*—like fleas on a dog—and there was no real evidence upon which the responsibility for this elusive condition in three of plaintiff’s flocks could legitimately be placed at defendant’s door (A63; A172-73; A187; A338-42).

Dr. Hoffman would have no part of the elusive Fatty Liver Syndrome diagnosis; he just felt the birds he saw (B-2 and C-2) were too fat. From obesity, Dr. Hoffman inferred that the hens overconsumed on energy. In his words, “they overate on calories, and from that, you infer the energy level of the diet is too high” (A213). Again, the only concrete evidence on the energy level of defendant’s feed was that it came within all energy level ranges recommended by plaintiff’s witnesses (A330-31).

But Dr. Hoffman himself came up with an even better inference as to why the two flocks he saw were fat. They just overate:

“I felt the birds were eating too much. [Mr. Leriche] doesn’t agree with me on that, but I think they were eating too much. Mr. Divoll, this is a very warm house. He kept it warm, and his feed consumption is on the high side, in my experience.” (A215)

Another theory discussed by the experts was that these chickens grew obese not because of a defect in the feed but

* Dr. Gibbs testified that Fatty Liver Syndrome may be the result of something in certain birds that predisposes them to this (A95). Even on flocks grown experimentally under varying circumstances at Cornell University, from 20 to 60 or 70 percent of the livers on a flock have been found to be fatty (Nesheim, A291). Even an examination of four birds from the homosote flock showed an incidence of Fatty Liver Syndrome (E16).

because the chickens were not making use of the feed for egg production as normal hens would. If the hens were eating and not producing because of disease or for some other reason, undoubtedly they could get fat (A74-75; A91-92; A222).

Plaintiff's experience with the Dostie flock bears out this testimony. For the first half of its laying cycle, the Dostie flock was rampant with diseases unrelated to the feed, any one of which could have caused the lowered egg production rates in that flock (A80). It was not until midway into the laying cycle, after months of reduced production, that Fatty Liver Syndrome first showed up in the flock. Defendant was improperly held liable for injury to this flock during times when disease indisputably caused the problem, and times when the effects of this disease likely caused the problem.

Even if a correlation could be made between a particular feed and a condition such as obesity or Fatty Liver Syndrome, the fact remains that defendant's feed was not continuously fed to plaintiff's flocks. If defendant is to be charged with liability for the effects of its feed over a long period, surely proof that this was the sole feed used prior to development of the problem should be the threshold requirement.

B. The Evidence was Equivocal As to the Cause of Disappointing Production Rates.

Even assuming the evidence was sufficient to establish defendant's feed as the probable cause for obesity or Fatty Liver Syndrome in three flocks, plaintiff failed to establish that the remaining flocks suffered from this same condition (see Point III, *infra*), or to forge a sufficient link between this condition and reduced egg production.

Plaintiff's expert testified that while excess fat may cause low production, he did not believe anyone could define the cause of the lowered production with certainty (A68).

This point has been forcefully underscored by the results of scientific experiments. Dr. Nesheim testified that in experiments at Cornell University, he never has been able to find any relationship between obesity or fatty liver and poor production (A268-70). He testified: "I have instances where I can quote where I have a flock that is very fat, but that the production rate is very good" (A275). Dr. Snet-singer, similarly, testified that in experiments he performed on defendant's research farm, he has found no correlation between excess body fat and decreased production (A343).

Plaintiff's witnesses themselves advanced perfectly sound explanations as to the cause of obesity and lowered egg production in flocks B-2 and Dostie.

In the disease-ridden Dostie flock, Dr. Gibbs testified that any one of the numerous diseases he recorded in the first half of the laying cycle could have itself accounted for lowered egg production (A80; A91). The molting which took place twice in that flock would certainly have decreased production averages. Finally, there is the mystery of the 5,980 birds added to the Dostie flock from an unidentified source. At the time these birds were introduced into the flock (June 1972), there was a substantial drop in the production curve, which continued to fall thereafter (E8). If, as Mrs. Leriche testified, the birds came from the elderly flock C-1, whose production days were over, of course this would account for the dropped averages. In any event, on such a record, defendant's feed could not reasonably be found to have caused the losses.

Flock B-2, in the opinion of the two veterinarians who had examined birds from this flock in August 1972, must have been hit by stress during the damage period. Dr. Bryant testified that Fatty Liver Syndrome would not cause the large drops reflected on plaintiff's production chart (A73). Dr. Murray felt the production dips on B-2 indicated "that something happened to the birds whether

it was environmental or disease, or something, it indicates that some kind of a stress hit these birds" (A48-51).

It was undisputed that if birds are brought into production too early, as by a program of excessive lighting, they will produce fewer eggs (A311), small eggs, and have low peak production (A333). Since plaintiff uncontrovertedly put the birds involved in this case into the laying houses at 20 weeks instead of at 22 weeks or even later as some recommend (A280), undoubtedly this accounted for reduced production averages. Again, defendant's feed would obviously not be the cause of such losses.

In Dr. Hoffman's view, examining the production losses shown on the charts:

"I think they are possible and reasonable. In other words, it is not hard for me to accept the fact that you would lose this much production from having overweight chickens.

"Q. So to that extent, they are consistent with your conclusions and testimony here today? A. Right."
(Tr. 720)

What is possible, or not hard for plaintiff's witness to accept, does not meet the test of reasonable certainty. In light of the nature of the injury, the evidence of other causes and the magnitude of the alleged damages, surely a more affirmative commitment should have been required to establish with reasonable certainty the inference that obesity caused lowered egg production, and to permit this issue to be considered by the jury.

The judgment should be reversed and judgment entered for defendant.

III.

As to the four phantom flocks, the evidence did not support—but indeed contradicted—plaintiff's claims.

Having inferred that the feed caused obesity or Fatty Liver Syndrome in three flocks, which caused disappointing egg production, plaintiff next sought to bring the four phantom flocks under its umbrella of inferences.

But one vital fact was missing. While birds from B-2, C-2 and Dostie had been examined and found to be obese, there was no evidence that the remaining flocks were fat. Indeed, the testimony and written reports on these flocks established precisely the contrary. Dr. Murray, both in his diagnostic reports and in his trial testimony, emphasized the extreme obesity of birds from B-2 and C-2 and their lack of production when he examined them in late 1972. If a similar condition had existed in the phantom flocks or if there had been any complaint about low production, Dr. Murray testified that he would have noted these points in his reports.

The obesity he saw in B-2 and C-2 was undoubtedly the most significant fact upon which Dr. Hoffman relied in reaching his conclusions about defendant's responsibility for the lowered egg production. Dr. Hoffman emphasized that he didn't care what the hens were fed (A219); he didn't care what defendant's program was (A231); he didn't even care how they were grown (A232). He was just looking at the fat chickens.

It is truly incredible that if the feed didn't make any difference, and the feeding program didn't make any difference, and the growing program didn't make any difference, the feed manufacturer was held liable in this case.

Since Dr. Hoffman had never looked at any of plaintiff's hens other than B-2 and C-2, and had never seen any of

plaintiff's pullets at all, of course he personally was in no position to draw the same conclusions as to any of plaintiff's other birds.

The single bridge leading to defendant's liability on the flocks which were no longer in existence when this controversy began was Dr. Hoffman's answer to a hypothetical question. Assuming (1) the birds looked "exactly the same" going into the laying houses as B-2 and C-2; (2) the feed program for these birds was the same; (3) that their low production was very similar to B-2 and C-2; and (4) that there was no disease, he expressed the opinion as to the cause of the low production, as follows:

"A. I think the facts are consistent with the diagnosis of the birds becoming too fat.

"Q. And, again, in your opinion what is the cause for the birds becoming too fat? A. They overconsumed on energy.

"Q. Again, that is a feed problem? A. Right." (A209)

Since the evidence did not support these four critical assumptions, the court should have stricken this testimony, and committed reversible error in denying defendant's motions.

As the court observed in *Ralston Purina Co. v. Edmunds, supra*, "If one assumes, as the witnesses were required to assume, that all other factors were satisfactory, focusing attention upon the pellet alone, no other answer could reasonably have been expected." By permitting Dr. Hoffman's necessarily damaging responses to be considered by the jury, despite the clear lack of support in the record, the court below committed reversible error.

Dr. Hoffman made it perfectly plain that his opinion rested on all four assumptions, and would not stand with-

out all four assumptions.* Yet the testimony of plaintiff's witnesses flatly contradicted his essential assumptions. The improper question and response were of course prejudicial to defendant with respect to the phantom flocks. But the impact of this improper evidence goes even beyond. The effect was to place before the jury seven apparently similar incidents which cumulatively painted a highly damaging picture, unwarranted by the facts. The judgment should be reversed as to these flocks, and a new trial granted as to the remaining flocks.

A. The Phantom Flocks Were Not Plump Going Into the Laying Houses.

The initial assumption was that the phantom flocks were "plump" going into the laying houses. Dr. Hoffman took pains to emphasize that one critical assumption leading to his opinion was that the birds *always* arrived at the laying houses in plump condition (A229-31). "[I]f pullets are housed fat, then it is somewhat easier for them to get fat while in the laying house" (A200). Thus, the assumption that the birds were housed fat was the vital underpinning for the next assumption that the hens were also fat (like B-2 and C-2).

There was no credible evidence to support the assumption that the phantom flocks *always* arrived at the laying houses in plump condition. As to at least two flocks—Dostie and C-1—during their laying cycle there was a substantial infusion of birds whose condition is not in the record at all. This assumption could therefore not conceivably have been applicable to C-1 and Dostie.

As to the remaining birds, Mr. Leriche of course saw the birds going into the laying houses, but he could not

* Even with these key assumptions, Drs. Nesheim (A271) and Snetsinger (A346) testified they considered the opinion highly speculative.

consistently testify that they were always plump. He personally never examined any of his birds in 1970 or 1971 (A134). He did at first say that he observed his birds were "beautiful" when going into the laying houses, and sometimes traded the word "beautiful" for the word "plump" (A124-25). But Mr. Leriche soon thereafter put this testimony in its proper light. He said: "I see hundreds and hundreds of thousands of birds, and how can I say five years ago I had fat birds?" (A131). Further on he explained that "chickens all look alike, you know" (A316). Surely such ephemeral testimony that the birds were "plump" could not furnish adequate basis to support an assumption upon which liability of \$162,820.12 rested.

Mr. Leriche's testimony standing alone was in and of itself insufficient to prove the essential fact that the pullets were always "plump" going into the laying houses, particularly in view of the considerable contradicting evidence.

The experienced poultry men who actually saw plaintiff's pullets pronounced that they look good—they did not say "plump," but "good," in the sense that they would lay well. Plaintiff's men many times told him the pullets looked very good (A125-26). Defendant's witness Ragland, who saw the pullets in July 1970, also testified that they looked good (A397), and defendant's salesman Gauthier testified they were "tops" (A321).

Most tellingly, thirteen medical diagnostic reports were prepared on plaintiff's pullets between 1970 and June 1972, and not one of these reports mentions any excess weight. Dr. Murray testified that he would have noted excess weight on his reports at the time had it existed. Indeed he did note excess weight in later reports on B-2 and C-2, when excess weight became a problem.

Against this contemporaneous written record and the descriptions given by plaintiff's men and defendant's witnesses, Mr. Leriche's sometimes use of the word "plump"

must fall into proper perspective. Dr. Murray's medical reports testify indisputably to the fact that plaintiff's pullets did not always arrive in the laying house in plump condition. Indeed, whereas Dr. Hoffman would *assume* that the hens in A-1, A-2, B-1 and C-1 became obese on defendant's feed, reports by persons who actually observed these birds soundly contradict Dr. Hoffman's unwarranted assumption and inference thereon.

B. The Assumptions Are Inapplicable As to Flock C-1.

Plaintiff's own testimony established that there was no basis for the assumption that C-1 pullets arrived in the laying houses in "plump" condition or even that they were grown on the same feed or feeding program. Indisputably, 4,000 birds—more than ten per cent of the flock—were received from a hatchery at 20 weeks to replace cancerous birds in C-1. Plaintiff did not know what they had been fed to that point, or even what they looked like. Moreover, as to these chickens, Mrs. Leriche herself acknowledged that younger replacement birds just coming into the laying cycle simply do not lay as well as birds in the normal cycle (A362). These birds alone laying at a reduced rate—as they must have—would obviously have brought down the averages for the entire flock.

With one perfectly sound explanation for lowered production rates in C-1 advanced by Mrs. Leriche herself, and with no basis in the evidence for Dr. Hoffman's assumptions as to C-1, it was error for the court below to sweep away the distinctions and permit the jury to assess liability and damages on this flock.

IV.

Proof as to damages was highly speculative and conjectural.

The evidence was so inadequate on the actual *quantum* of damages that the case should not have gone to the jury at all on this issue, and a new trial should therefore be granted. See, e.g., *U.S. v. Simmons*, 346 F.2d 213 (5th Cir. 1965). Plaintiff's proof of damages was beguiling. While plaintiff produced highly specific calculations as to its lost expectations, plaintiff had no legitimate basis for those expectations, and therefore the proof was insufficient. Plaintiff failed in its obligation to submit evidence for which there is some reasonable basis, and not evidence which is conjectural or speculative.

For example, in *Texsun Feed Yards, Inc. v. Ralston Purina*, 447 F.2d 660 (5th Cir. 1971), the court found there was a "sufficient predicate" for the damages award where plaintiff proved down to the penny, by its own financial records, the existence of actual dollar losses (profits for 1966, and losses in 1967 and 1968), and also proved the amounts of rebates, refunds and adjustments it was forced to make in 1967. Even in *Green v. Ralston Purina Company*, 376 S.W.2d 119 (Mo. 1964), where the court found there was insufficient evidence to make a submissible case plaintiff proved as the basis for damages sought that he had actually suffered an average mortality rate of 5 percent prior to the use of the complained-of feed. After using defendant's feed, mortality went to 29 percent (or, as the court itself determined, 12.2 percent). In both cases, there was some rational basis in those plaintiffs' own performance records upon which a jury might assess the amount of damages that would compensate them for the injury suffered.

In the present case, the Goal Performance Charts do not establish this plaintiff's damages. Plaintiff had a track record of eight years in this business. It simply chose not

to disclose this record, except in one limited instance where it was favorable (homosote). Plaintiff testified at several points in the examination that, other than homosote, it had always experienced poor production rates (A129-30).^{*} Yet, because of the improper proof, plaintiff recovered for virtually every single egg it would have had if all of its hens had reached the maximum levels of every chart. Plaintiff recovered lost "expectations" without proving that its own prior years of performance justified such expectations.^{*}

Apart from the improper speculative nature of the damage proof in its entirety, at each level in plaintiff's calculations, the evidence was inherently unreliable, as plaintiff's own witnesses amply proved. The production curves on the Goal Performance Charts which established plaintiff's injury were based on hens beginning to lay at the age of 22 weeks. The undisputed documentary evidence, as well as plaintiff's testimony, indicated that its pullets went into the laying houses at 20 weeks. According to plaintiff's witness Mr. Mercia (A311), the chickens would have peaked at lower rates and experienced lower production for this rea-

^{*} The court below excluded defendant's evidence as to absence of complaints because there were too many variables, yet it allowed plaintiff to prove its entire case—injury as well as damages—by the goal production rates of other breeders. Either the experience of other poultry growers was relevant, in which event the absence of any complaints as to defendant's feed should have been admitted, or it was not relevant because there were too many variables, in which event the Goal Performance Charts should also have been excluded. Once again, the court permitted plaintiff to enjoy inconsistent positions (see p. 24, *supra*), both of which prejudiced defendant.

^{*} Mr. Leriche's testimony was inconsistent on this point. He sometimes testified that he *always* had poor production. But plaintiff, a poultry farmer of long experience, would hardly have continued using defendant's feed for eight full years, during which its operation expanded, if the production results were always bad. If Mr. Leriche was saying only that plaintiff always had experienced bad production in the Vermont complex (as he did at other points in his testimony), then where was proof of a track record for all the prior years?

Proof as to results in one carefully selected instance (homosote) may be relevant on the issue of injury, but it certainly does not establish this plaintiff's track record, or justifiable expectation.

son alone. In view of this fact, as well as the substantial evidence of disease and other problems which necessarily would have reduced production, these idealized charts should not have been admitted to establish plaintiff's injury or measure its damages. Proof as to "Dozen Expected" should have been ruled insufficient as a matter of law.

The figures offered for "Dozen Received" similarly should have been ruled insufficient, because of their proven unreliability.

In the complex, but not in Dostie or homosote, plaintiff during the damage period installed an automatic egg-counting machine. In Dostie and the homosote building, the eggs were collected and counted by hand. There is a proven loss just in the automatic counters alone. Mr. Leriche gave a vivid picture of plaintiff's problems with the new machine: "Sometime, mechanical failure happen and you get 100 eggs that goes on the floor . . ." (A413). Such losses were not accounted for in plaintiff's charts (A335).

Plaintiff acknowledged that its pickups were highly sporadic, which itself caused breakage and loss of eggs. Defendant recommended at least three daytime pickups, to insure quality and avoid excessive breakage (E33, p. 24; Tr. 1064). Plaintiff permitted eggs to accumulate in the belts for days, often to a point where it was impossible to handle them. As defendant's salesman observed, there were always signs of breakage (A319). Plaintiff's undeniably poor poultry management in this respect (A300) also should not have been a part of the damages assessed against defendant.

"Dozen Received" also failed to take into account the inevitable losses of eggs in cages, as by falling through the slats or being eaten (A295; A311). Mrs. Leriche, the keeper of plaintiff's records, testified that she never heard of such a thing (A250).

Because of the proven unreliability and speculative nature of plaintiff's evidence on damages, the judgment should be set aside and a new trial granted as to damages.

Conclusion

Based upon the foregoing, the verdict and judgment appealed from should be set aside. The proof of a defect in defendant's product and causation of plaintiff's injury was insufficient to raise a jury question as to the entire claim or, alternatively, was insufficient as to four of the seven flocks in issue. On either basis judgment should be entered for defendant and, if as to the four flocks only, a new trial ordered on damages as to the remaining three.

If judgment for defendant is not found, a new trial should be granted because proof of damages was patently conjectural and unreliable, and because the court below erroneously excluded defendant's evidence as to the absence of complaints.

September 16, 1974

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERMONT FOOD INDUSTRIES, INC.,

Plaintiff-Appellee,

against

RALSTON PURINA COMPANY,

Defendant-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 17th
day of December, 1974, he served two copies of the
Brief of Defendant-Appellant
Richard E. Davis Associates, Inc.

the attorney for the Plaintiff-Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. P. O. Box 666, Barre, Vermont 05641 () ~~XXX~~,
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

17th day of December, 1974.

Courtney Brown
COURTNEY BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976